IN THE

Supreme Court of the United States

NO. 81

OCTOBER TERM, 1961

THOMAS N. GRIGGS

v.

COUNTY OF ALLEGHENY

PETITION FOR REHEARING

MAURICE LOUIK
County Solicitor

FRANCIS A. BARRY
First Asst. County Solicitor

CRAIG T. STOCKDALE
Special Counsel

HAROLD GONDELMAN
Asst. County Solicitor

401 County Office Building
Pittsburgh 19, Pa.

SMITH BROS. CO. INC., LAW PRINTERS, 434-436 BLVD. OF ALLIES, PITTSBURGH 19, PA.

INDEX

TABLE OF CITATIONS

CASES

Table of Citations.

IN THE

Supreme Court of the United States

NO. 81

OCTOBER TERM, 1961

THOMAS N. GRIGGS

v.

COUNTY OF ALLEGHENY

PETITION FOR REHEARING

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Petitioner, County of Allegheny, prays for a rehearing of the case decided by your Honorable Court on March 5, 1962, reversing the decision of the Pennsylvania Supreme Court. The far reaching effect of this decision in the development of national and international aviation could not be envisioned by your Petitioner when on June 5, 1961, certiorari was granted and that case transferred to the summary calendar for argument with the case of *Goldblatt v. Town of Hempstead,* 78 October Term, 1961. The effect of this action by your Honorable Court was necessarily to limit the extent of the issue which could be presented for oral argument.

The decision of March 5, 1962, raises many complex issues that were not presented to your Honorable Court. The ramifications of this decision have elicited so much comment from and nationwide concern to all parties interested in the future of aviation in the United States that all interested parties, and in particular the United States, should be afforded an opportunity to present their positions upon all of the complex problems resulting from such decision.

Your Petitioner submits the following reasons in support of this Petition for Rehearing:

1. The decision of March 5, 1962, is at variance with the express intent of Congress that the Federal Government preempt the field of the use and control of the navigable air space and is also at variance with prior decisions of your court which hold that Federal statutes and regulations dealing with matters of vital national concern supersede any state activity in the same field.

2. The United States Government, which is a necessary party to these proceedings, has not participated in the conduct of the case before your court.

3. The decision of March 5, 1962, is at variance with the express holding in *U. S. v. Causby*, 328 U.S. 256.

I. The Decision of March 5, 1962, Is At Variance With the Express Intent of Congress that the Federal Government Preempt the Field of the Use and Control of the Navigable Air Space and Is Also At Variance With Prior Decisions of Your Court Which Hold that Federal Statutes and Regulations Dealing With Matters of Vital National Concern Supersede any State Activity In The Same Field.

The express intent of Congress to preempt the field of air navigation in the United States is apparent from the provisions of the Civil Aeronautics Act, Pub. L. 85-726, Title I, § 101, Aug. 23, 1958, 72 Stat. 737, amended Pub. L. 87-197, § 3, Sept. 5, 1961, 75 Stat. 467 and its antecedent legislation.

In 49 U.S.C., § 1303, the administrator is mandated to consider among other things as being in the public interest:

> "(c) The control of the use of the navigable airspace of the United States and the regulation of both civil and military operations in such airspace in the interest of the safety and efficiency of both."

49 U.S.C., § 1304 provides:

> "There is recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit through the navigable airspace of the United States."

The courts, prior to the decision of March 5, 1962, have construed this section as meaning that "airspace" through which an aircraft travels, takes off and lands, is in the public domain. *City of Newark, New Jersey, et al. v. Eastern Airlines, Inc.*, 159 F. Supp. 750 (1958);

***Allegheny Airlines, Inc., et al. v. Village of Cedarhurst, et al.*, 238 F. 2d. 812.**

The Committee on Interstate and Foreign Commerce, to whom the bill to create a Civil Aeronautics Board and a Federal Agency (S. 3880) was referred, stated (U.S. Code and Congressional and Administrative News, 1958 85th Congress 2d. Session) in its discussion at page 3741:

> "The new Federal Aviation Agency would be headed by a civilian administrator with plenary authority to. . .
>
> (a) allocate airspace and control its use by both civil and military aircraft."

It cites a message of the President to Congress on June 13, 1958, in which he recommended the creation of an independent Federal Aviation Agency

> "In which would be consolidated among other things all the essential management functions necessary to support the common needs of our civil and military aviation." (*U.S. Code and Congressional and Administrative News*, supra, page 3742)

The report, under the heading, "Need for Legislation" indicates clearly the intention of Congress to completely regulate this field inasmuch as authority is explicitly given the administrator

> ". . . to regulate the use of all airspace over the United States by both civil and military aircraft and to establish and operate a unified system of air-traffic control." *U.S. Code and Congressional and Administrative News*, supra, page 3745)

The intent of Congress to give the administrator complete authority on the location of runway layout of both civilian and military airports is clearly delineated (Page 3749). It is explicitly stated that the administrator have notice of and control over construction and airport alteration which might interfere with the use of navigable airspace. The Legislative History, (Page 3760), shows that the Chairman of the Committee on Interstate and Foreign Commerce was advised that the enactment of the Bill would be in accord with the program of the President to provide for the regulation and promotion of civilian aviation in such manner as to best foster its development and safety and to provide for the safe and efficient use of the airspace by both civilian and military aircraft. On page 3761, E. R. Quesada, by letter to the Chairman of the Airways Modernization Board advised that the Act as proposed, accomplished in all major respects the plans and objects set forth in the so-called "Curtis Report", of 1957, and that the Curtis Report convincingly revealed that if aviation were to continue to grow in a satisfactory manner, maintaining a high level of safety, certain organizational faults in the federal government required correction.

> *"The principal organizational need is for a unified Federal aviation agency into which are consolidated all of the essential management functions common to both civil and military aviation. S. 3880 would accomplish this essential need."* (Emphasis supplied)

The letter further states that both civilian and military operations will be accomplished under the aegis of the agency and that the legislation is in accordance with the President's program, and that he was authorized to

state that these views were the official views of the administration.

In a similar letter, Malcolm A. McIntyre, Undersecretary of the Air Force, speaking also for the Department of Defense, pointed out the importance of this legislation and urged

> ". . . that the Congress set up at the earliest date a single agency with the broad authority to support common needs of civil and military aviation in the United States and to provide for the safe and efficient use of the airspace, taking into full account the military requirements for national defense and the needs of civil aviation. S. 3880 as referred to your committee, effectively accomplishes these objectives.
>
> S. 3880 represents, in the opinion of the Department of Defense, an excellent balancing of the civil and military interests involved in national aviation, with the objective of achieving effective joint planning and greater safety and efficiency in the use of the airspace. . ." idem, p. 3762.

In support of the conference committee's recommendations on the original Civil Aeronautics Act of 1938, Congressman Schenck, a member of the House Committee on Interstate and Foreign Commerce stated, Vol. 104, Congressional Record, page 17455, as follows:

> "This legislation is very necessary . . . and it is important not only for all those who fly and use private, commercial and military aircraft, but *it is also very important to all those over whom and over whose property these flights are made.*" (Emphasis supplied)

The need for centralized control of navigable airspace for safety and national defense was emphasized also in the original passage of the Civil Aeronautics Act of 1938, at the instance of then Senator Harry S. Truman, (Congressional Record, 75th Congress 3rd Session, Volume 83, Part 6, page 6626, et seq.) At that time, Senator Copeland, a member of the Committee which was chaired by Senator Truman, states on page 6627:

> "For a period of two years we studied all matters having to do with air safety and we reached the conclusion that there must be a more centralized organization of all activities involved in aviation in order that the subject may be dealt with in a proper manner."

Senator Truman cites a report of the President's Aviation Commission of 1935 recommending the creation of the Board. At page 6724 he states:

> ". . . it further recommended that there be no legislative limitation upon the growth of air transportation; that there should be close and continuous Government control of the aids for airlines, that is, the ground items, which make flight safe; that provision should be made to specify economical quality of service; that financial structure of airlines should be supervised and watched over by the governmental agencies; and that there should be a grandfather clause. All these suggestions are included in the pending bill."

Senator Truman, discussing certain proposed amendments to the bill, on page 6728, points out clearly the intention of the bill to preempt the field of air naviga-

tion in discussing the removal of hazards, and who should pay the costs for such removal. He stated as follows:

> ". . . I believe it is unwise for Congress to forsake the long established precedent that owners of obstructions to interstate commerce should bear the expense of removing or lighting them. No person may place obstructions in the navigable waters with impunity, so should it be with respect to navigable airspace."

Here the intention is clear that Congress preempted the field under the commerce clause of the Constitution.

From a review of the legislative histories of both the Civil Aeronautics Act of 1938, and the Federal Aviation Act of 1958, and the declaration of policy expressed in each, it is apparent that Congress expressed its intent to preempt the field of the navigable airspace in the United States to the exclusion of the states or local municipalities.

On the issue of preemption or supersession, this Court, in *Pennsylvania v. Nelson*, 350 U.S. 497 (1956) held at page 501 as follows:

> "Where, as in the instant case, Congress has not stated specifically whether a federal statute has occupied a field in which the States are otherwise free to legislate, different criteria have furnished touchstones for decision. Thus, '[t]his Court, in considering the validity of state laws in the light of . . . federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance;

difference; irreconcilability; inconsistency; violation; curtailment; and interference. But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula.' Hines v. Davidowitz, 312 U.S. 52, 67."

The court established three tests of supersession in the *Nelson case, supra,* (pages 502-5)

"First, '[t]he scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.' Rice v. Santa Fe Elevator Corp., 331 U.S. at 230."

The court examined the Act solely to determine the congressional plan and held that in looking to all of them in the aggregate the

". . . conclusion is inescapable that Congress has intended to occupy the field of sedition."

The second test found in the *Nelson case* is that

". . . the federal statutes 'touch a field in which the federal interest is so dominant that the federal system [must] be assumed to preclude enforcement of state laws on the same subject.' Rice v. Sante Fe Elevator Corp., 331 US., at 230, citing Hines v. Davidowitz, supra."

The court then held that Congress had treated seditious conduct as a matter of vital national concern, and therefore, it was in no sense a local enforcemeent problem.

The final test set forth in the *Nelson case* is that the

> ". . . enforcement of state sedition acts presents a serious danger of conflict with the administration of the federal program."

The court further stated at page 509:

> "When we were confronted with a like situation in the field of labor-management relations, Mr. Justice Jackson wrote:
>
> 'A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law.' "

Garner v. Teamsters Union, 346 U.S. 485, 490-491 is cited in support of the above principle.

Although the *Nelson case* concerns criminal law and the application of supersession of federal acts in relation thereto, the tests set forth by this Court are equally apposite to the case at issue. As in the *Nelson case,* the scheme of federal regulation of navigable airspace is so pervasive as to leave no room for the states to supplement it or to be liable for any use of the navigable airspace. Furthermore, the Federal Aviation Act and its predecessor, the Civil Aeronautics Act touched a field in which the federal interest is so dominant that the federal system must preclude any interference by the states or local municipalities. Finally, the enforcement of state or municipal actions concerning aviation would present a serious danger of conflict with the administration of the federal program.

This Court has frequently held that federal statutes have preempted particular areas to the complete exclusion of the states. See *Rice v. Santa Fe Elevator Corp. et al.*, 331 US 218, (United States Warehouse Act); *Bethlehem Steel Co. et al., v. New York State Labor Relations Board*, 330 U.S. 767, (National Labor Relations Act); *Napier v. Atlantic Coast Line Railroad Company*, 272 U.S. 605, (Federal Locomotive Boiler Inspection Act); *Pennsylvania Railroad Co. v. Public Service Commission*, 250 U.S. 566, (Interstate Commerce Act); *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148, (Federal regulation of renovated butter); *Savage v. Jones*, 225 U.S. 501, (Federal Food and Drug Act); *Hines v. Davidowitz*, 312 U.S. 52, (Federal Alien Registration Act); *Hill v. Florida*, 325 U.S. 538, (National Labor Relations Act).

In *Pennsylvania Railroad Company v. Public Service Commission, supra;* at page 569, Mr. Justice Holmes states:

> "The subject-matter in this instance is peculiarly one that calls for uniform law and in our opinion regulation by the paramount authority [United States] has gone so far that the statute of Pennsylvania cannot impose the additional obligation in issue here."

The reasons for holding that federal regulations have preempted the field in the above-cited cases are more cogent when applied to the case *sub judice*. One of the prime purposes of the Federal Aviation Act and its predecessors was to establish and maintain a federal agency with sole power to promulgate such regulations as were necessary, *inter alia*, to provide for strengthened

military aircraft installations and for efficient air mail service regulation. In these matters, the federal government is the paramount authority. Insofar as civilian and military aircraft operation is concerned, it is the federal agency which prescribes to the minutest detail[1] the patterns of flight, altitude, direction of take off and landing, operational equipment and standards for safety to be met by airports, aircraft and equipment. It is difficult to conceive of legislation more sweeping in scope or which could occupy the field more completely than the federal legislation and regulations concerning air navigation.

The federal legislation and regulations not only control the navigable airspace, but are the source of the rights and privileges of every user of the navigable airspace in the United States. If the County has appropriated an easement in the navigable airspace and is liable in damages therefor, it is inconsistent with the proposition that all rights and privileges to use that which the County "owns" emanates not from the County but from the federal government.

The all inclusive aspects of the federal regulation of air navigation is succinctly set forth in the concurring opinion of Mr. Justice Jackson in the case of *North-West Airlines, Inc., v. State of Minnesota*, 322 U.S. 292, 302-303:

> "Aviation has added a new dimension to travel and to our ideas. The ancient idea that landlordism and sovereignty extend from the center of the world to the periphery of the universe has been modified. Today the landowner no more possesses a vertical

1. Mr. Justice Black in his dissent refers to: "Congress' finely tuned national transit mechanism".

control of all the air above him than a shore owner possesses horizontal control of all the sea before him. The air is too precious as an open highway to permit it to be 'owned' to the exclusion or embarrassment of air navigation by surface landlords who could put it to little real use.

"Students of our legal evolution know how the Court interpreted the commerce clause of the Constitution to lift navigable waters of the United States out of local controls and into the domain of federal control. *Gibbons v. Ogden*, 9 Wheat 1, to *United States v. Appalachian Electric Power Co.*, 311 U.S. 377. Air as an element in which to navigate is even more inevitably federalized by the commerce clause than is navigable water. Local exactions and barriers to free transit in the air would neutralize its indifference to space and its conquest of time."

"Congress has recognized the national responsibility for regulating air commerce. Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxies onto a runway it is caught up in an elaborate and detailed system of controls. It takes off only by instruction from the control tower, it travels on prescribed beams, it may be diverted from its intended landing, and it obeys signals and orders. Its privileges, rights and protection, so far as transit is concerned, it owes to Federal Government alone and not to any state government."

The regulation and privileges granted by the federal government under the commerce clause of the Constitution precludes State action: (*Cloverleaf Butter Co. v. Patterson, supra*). Since the federal aviation system has preempted the field of navigable airspace in the United States, any taking of property was a taking by the federal government for which it alone is responsible in damages.

II. The United States Government, Which Is a Necessary Party to These Proceedings, Has Not Participated In The Conduct of the Case Before Your Court.

In view of the foregoing discussion, the necessity of the participation of the federal government is clear. When this case, and its companion cases first arose (*Gardner v. Allegheny County*, 382 Pa. 88, (1955)), the question was raised by the County as to whether the federal government and federal agencies and officers were necessary and indispensable parties to the litigation. The Supreme Court of Pennsylvania, in an appeal in equity proceedings which attempted to restrain the flight of aircraft in and out of the Greater Pittsburgh Airport, decided that the United States was not a necessary party. In the *Gardner case, supra*, as appears in that decision at 382 Pa. p. 93, the United States Government participated in the appellate proceedings, upon reargument before the Pennsylvania Supreme Court, as amici curiae; and in those appellate proceedings, presented its views on what constitutes navigable airspace, contending exactly as it did in the case of *Allegheny Airlines, Inc., et al., v. Village of Cedarhurst, et al., supra*, that the United States had exclusive control over the navigable airspace. However, since the Supreme

Court of Pennsylvania ruled that the United States was not a necessary and indispensable party, the Government has, since that time, detached itself from this controversy.

Because of the dismissal of the contention by the Pennsylvania courts that the United States was a necessary and indispensable party, this contention was never fully raised before the Supreme Court of the United States, and at the oral argument, several of the Justices expressed their concern that the United States Government was not participating in this controversy.

At the original argument of this case, the matter was put on the summary calendar and as a result, the only issue that was presented to the court was the very narrow aspect as to whether the Pennsylvania Supreme Court was correct in holding that the County of Allegheny, as an airport operator, was not liable to the property owner. The question of whether the United States had so preempted the field of air navigation that no other party or body could be liable was never orally argued before this court because it was not then an issue.

Under the Federal Aid for Public Airport Development Act, 49 U.S.C. §§ 1109, 1112(a)2, the United States has a direct financial interest in the acquisition costs of property in and about the Greater Pittsburgh Airport as recognized in the opinion of March 5, 1962. Furthermore, Congress has explicity set forth its Declaration of Policy as to the national interest in air navigation not only in 1938, 49 U.S.C. § 402, but also in 1958 49 U.S.C. § 1302, as follows:

> "In the exercise and performance of its powers and duties under this chapter, the Board shall con-

sider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

• • •

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense; . . ."

It is apparent, therefore, that the United States is a necessary and indispensable party to the controversy not only because of its direct financial participation in the acquisition of interests in lands in and about the Greater Pittsburgh Airport, but also because of its paramount interest in air commerce, the national defense and the operation of the postal service.

Having taken cognizance of this matter, your Honorable Court should grant a rehearing, at which time parties affected, and particularly the United States Government, should be requested by your Honorable Court to present their views of an issue which vitally concerns air navigation in the United States.

III. The Decision of March 5, 1962, Is At Variance With the Express Holding In U.S. v. Causby, 328 U.S. 256.

It is submitted that the decision of March 5, 1962 is inconsistent with the holding in *U. S. v. Causby,* 328, U.S. 256. In the *Causby case,* liability was predicated on the fact that aircraft of the United States caused the damage to the claimants. Liability was predicated on the actual operation of the aircraft. The actual operator of the airport, the public body in the same position as the defendant in this case, was the Greensboro Highpoint Authority. It is believed that implicit in the *Causby* opinion enunciated by this Court, is the proposition that the actual operator of the aircraft is liable to a claimant, which decision is inconsistent with the decision in the instant case. *Causby* held at page 267 that the extent of an easement should be determined

> ". . . in terms of frequency of flight, permissible altitude or type of airplane."

The County of Allegheny has contended, *inter alia,* that it is not liable for any damage to the Griggs property because it does not own, operate or control the planes in flight over the Griggs' property;[2] nor does it operate or control the type of planes or the number of flights over the Griggs property; nor has the County

---

2. Mr. Justice Douglass in the Majority Opinion of March 5, 1962, found:

"No flights were in violation of the regulations of the C.A.A.; nor were any flights lower than necessary for a safe landing or take off."

any control over the noise characteristics of the planes or the vertical or horizontal fashion of their flight.[3]

These matters for the most part are controlled by employees of the federal government acting under the broad powers created by the federal system of aviation regulations. Since it is the federal government's employees and regulations which govern the type, number and altitude of flights, as well as their take-off and landing, a change in the federal regulations might, under the decision of March 5, 1962, constitute a condemnation by the County of Allegheny without its knowledge and without any affirmative action on the part of the municipality.

In the majority opinion of March 5, 1962, this Court held:

> "We think, however, that respondent, which was the promoter, owner and lessor of the airport, was in these circumstances the one who took the air easement in the Constitutional sense."

Nevertheless, in the *Causby case,* damages were assessed, not against the municipality, Greensboro Highpoint Authority—which was the promoter, owner and lessor, but against the United States, which leased space from the municipality and owned and controlled the flights which caused the damages for which compensation was awarded.

---

3. If the theory of your Honorable Court is that by the mere laying out of the airport the County is liable, the County respectfully submits that the federal government, and not the County, located and actually paved the runway in question at a time when the airport was a military airport and before it was turned over to the County. Condemnation should be the conscious act, formal or informal, of the entity which will be required to respond in damages for the result of such action. The public body is as much entitled to "due process" as the property owner.

For the foregoing reasons, it is respectfully submitted that the decision of March 5, 1962, is inconsistent with the decision in the *Causby case*. The interest of national and international aviation require that this apparent inconsistency be resolved so that the liability of the County of Allegheny and others similarly situate, may be determined with some degree of certainty.

CONCLUSION

If, under the authority of the decision of March 5, 1962, the County of Allegheny would attempt to regulate the navigable air space which your Honorable Court held it has "taken" and which it would then "own", and all other airport operators attempted so to act, the result would be the nullification of federal legislation, regulations, supervision and control.

It is respectfully requested, therefore, that the Petition for Rehearing in this case be granted and that other affected parties, and in particular the United States, be invited or directed to present their position to your Court on this vital subject.

MAURICE LOUIK
County Solicitor
FRANCIS A. BARRY
First Assistant County Solicitor
CRAIG T. STOCKDALE
Special Counsel
HAROLD GONDELMAN
Assistant County Solicitor
Attorneys for Petitioner

CERTIFICATION

I, MAURICE LOUIK, Solicitor for the County of Allegheny, hereby certify that the within Petition for Rehearing is presented in good faith and not for the purpose of delay.

MAURICE LOUIK

Solicitor for County of Allegheny, Petitioner